

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In re REFCO INC. SECURITIES LITIGATION
-----X

Case No. 07-MD-1902 (JSR)

This Document Relates to:
-----X

KENNETH M. KRYIS, et al.,

Plaintiffs,

-against-

CHRISTOPHER SUGRUE, et al.,

Defendants.

:
:
Case No. 08-CV-3065 (JSR)

:
Case No. 08-CV-3086 (JSR)

-----X
KENNETH M. KRYIS, et al.

Plaintiffs,

-v-

DEUTSCHE BANK SECURITIES INC., et al.

Defendants.

:
Case No. 10-CV-3594 (JSR)

**RULE 56.1 STATEMENT OF MOVING DEFENDANTS
IN SUPPORT OF SUMMARY JUDGMENT WITH PLAINTIFFS' RESPONSES**

Defendants PricewaterhouseCoopers LLP ("PwC"), Credit Suisse Securities (USA) LLC ("Credit Suisse"), Merrill Lynch, Pierce, Fenner & Smith, Incorporated, as successor-by-merger to Banc of America Securities LLC ("BAS"), Deutsche Bank Securities Inc. ("DBSI"), Mayer Brown LLP ("Mayer Brown"), Edward Best, Joseph P. Collins, Paul Koury, Grant Thornton LLP ("Grant Thornton") and Mark Ramler (collectively, "Moving Defendants") respectfully resubmit their statement of material facts as to which there is no genuine issue to be tried with

Plaintiffs' responses added below each statement to assist the Court in deciding the motions for summary judgment made by the Moving Defendants.¹

1. Plaintiff SPhinX Managed Futures Fund SPC ("SMFF") was comprised of various portfolios ("Portfolios"), which maintained cash accounts at Refco Capital Markets, Ltd. ("RCM") (collectively, the "RCM Accounts") starting in or about December 2002. *See* Declaration of James J. Capra, Jr. in Support of PwC's Motion for Summary Judgment, dated August 2, 2012 ("Capra Decl."), ¶ 3 and Exhibit 1 thereto ("Report on cash balances and transfers in respect of the SPhinX Group of Companies," signed and dated June 29, 2012 by Kenneth M. Krys ("Krys Expert Report")) 3.4, 3.6, 3.7, Appendix 3 and Appendix 6.

Plaintiffs' Response

Plaintiffs dispute the facts stated in Paragraph 1 of the Moving Defendants' Rule 56.1 Statement. Each of the RCM Accounts referred to in Paragraph 1 was denominated a "USD Margin Account." *See* Simpson Decl. Ex. P (sample account statement). SMFF also held foreign currency exchange trading, or "FX," accounts at RCM. *See* Simpson Decl. Ex. Q (sample FX account statement).

2. On or about October 12, 2005, SMFF transferred \$312,046,266 (approximately, and hereinafter, "\$312 million") from the RCM Accounts (the "October 2005 Transfer") to Refco LLC. *See* Capra Decl. ¶ 5 and Exhibit 1 (Krys Expert Report) 3.8, Appendix 6.

¹ Plaintiffs have put forward "Additional Material Facts" on reliance in their response to the Rule 56.1 Statement (¶¶ 24-37). Plaintiffs' characterization of the discovery record on this issue is highly misleading. Because the merits of Plaintiffs' assertions on reliance are not material to the current motion, however, Moving Defendants have not responded to these assertions (nor do they have any obligation under Local Rule 56.1 to do so).

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 2 of the Moving Defendants' Rule 56.1 Statement.

A. The Timing of Events at Refco

3. On June 8, 2004, THL Refco Acquisition Partners, Refco Group Ltd., LLC ("RGL"), and certain other parties entered into an equity purchase and merger agreement. The agreement provided for a series of transactions through which THL Refco Acquisition Partners and its affiliates and co-investors would own approximately 57% of an entity that was to become the parent of RGL (the "LBO Transaction"). *See* Capra Decl. ¶ 8 and Exhibit 3 (Confidential Offering Circular excerpt).

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 3 of the Moving Defendants' Rule 56.1 Statement.

4. In connection with the LBO Transaction, Refco Finance Holdings LLC (which was later merged into RGL) and Refco Finance Inc. ("Refco Finance") offered notes ("Notes") for purchase through a Confidential Offering Circular, dated July 22, 2004. *See* Capra Decl. ¶ 8 and Exhibit 3 (Confidential Offering Circular excerpt).

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 4 of the Moving Defendants' Rule 56.1 Statement.

5. The LBO Transaction closed on August 5, 2004. *See* Capra Decl. ¶ 11 and Exhibit 6 (Amended Complaint excerpt) at ¶ 254.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 5 of the Moving Defendants' Rule 56.1 Statement.

6. RGL and Refco Finance filed an S-4 registration statement with the Securities and Exchange Commission ("SEC") on October 12, 2004 in connection with an exchange offer for the Notes, which was RGL's first SEC filing. *See* Capra Decl. ¶ 9 and Exhibit 4 (S-4 filing, cover page).

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 6 of the Moving Defendants' Rule 56.1 Statement.

7. Refco Inc. ("Refco") filed an S-1 with the SEC on April 8, 2005 in connection with its initial public offering ("IPO"). *See* Capra Decl. ¶ 10 and Exhibit 5 (S-1 filing, cover page). Refco's IPO commenced on or about August 10, 2005. *See* Capra Decl. ¶ 11 and Exhibit 6 (Amended Complaint excerpt) at ¶¶ 279, 907.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 7 of the Moving Defendants' Rule 56.1 Statement.

B. Changes in SMFF's Cash Balance at RCM Over Time

8. The table below shows the change in SMFF's balances in the RCM Accounts from different dates through the time immediately preceding the October 2005 Transfer:

Starting Date	Starting Date Description	Starting Date Balance	October 2005 Transfer	(Decrease) in Balance from Starting Date to October 2005 Transfer
August 5, 2004	Refco's LBO	\$541,577,862	\$312,046,266	(\$229,531,596)
October 12, 2004	Refco's initial S-4 Filing	\$586,087,197	\$312,046,266	(\$274,040,931)
April 8, 2005	Refco's initial S-1 Filing	\$522,235,446	\$312,046,266	(\$210,189,180)
August 10, 2005	Commencement of Refco's IPO	\$395,230,539	\$312,046,266	(\$83,184,273)

See Capra Decl. ¶¶ 2, 6, and Exhibit 1 (Krys Expert Report) Appendix 6, and Exhibit 2.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 8 of the Moving Defendants' Rule 56.1 Statement. However, the decrease in balances at RCM is irrelevant for the reasons stated in Plaintiffs Memorandum in Opposition to the Moving Defendants' Motion.

9. At all times between August 5, 2004 and late September 2005, the balance in the RCM Accounts was greater than \$312 million. See Capra Decl. ¶¶ 2, 7, and Exhibit 1 (Krys Expert Report) Appendix 6.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 9 of the Moving Defendants' Rule 56.1 Statement. However, the decrease in

balances at RCM is irrelevant for the reasons stated in Plaintiffs Memorandum in Opposition to the Moving Defendants' Motion.

C. PwC

10. PricewaterhouseCoopers LLP ("PwC") was first engaged by RGL to provide accounting advisory services on or about May 5, 2004. *See* Capra Decl. ¶¶ 11, 12, and Exhibit 6 (Amended Complaint excerpt) at ¶ 570 and Exhibit 7 (PwC Engagement Letter).

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 10 of the Moving Defendants' Rule 56.1 Statement.

11. On May 5, 2004, preceding the engagement of PwC by RGL, the balance in the RCM Accounts was \$429,220,086. During the period from May 5, 2004 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$117,173,820. *See* Capra Decl. ¶ 2 and Exhibit 1 (Krys Expert Report) Appendix 6.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 11 of the Moving Defendants' Rule 56.1 Statement. However, the decrease in balances at RCM is irrelevant for the reasons stated in Plaintiffs' Memorandum in Opposition to the Moving Defendants' Motion.

D. Credit Suisse, BAS, and DBSI

12. Credit Suisse, BAS, and DBSI served as initial purchasers and joint book-running managers of the private placement of the Notes in connection with the LBO Transaction. *See*

Capra Decl. ¶¶ 8, 11, and Exhibit 3 (Confidential Offering Circular excerpt) and Exhibit 6 (Amended Complaint excerpt) at ¶¶ 877, 880.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 12 of the Moving Defendants' Rule 56.1 Statement.

13. On August 5, 2004, preceding the LBO Transaction, the balance in the RCM Accounts was \$541,577,862. During the period from August 5, 2004 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$229,531,596. *See* Capra Decl. ¶¶ 2, 6, and Exhibit 1 (Krys Expert Report) 4.4, Appendix 6 and Exhibit 2.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 13 of the Moving Defendants' Rule 56.1 Statement. However, the decrease in balances at RCM is irrelevant for the reasons stated in Plaintiffs' Memorandum in Opposition to the Moving Defendants' Motion.

14. Credit Suisse and BAS (and other financial institutions not a party to this action) served as joint book-running managers of the underwriting syndicate for the IPO, and DBSI (and other financial institutions not a party to this action) served as co-managers and underwriters for the IPO. *See* Capra Decl. ¶¶ 10, 11, Exhibit 5 (S-1 excerpt), and Exhibit 6 (Amended Complaint excerpt) at ¶¶ 877, 880.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 14 of the Moving Defendants' Rule 56.1 Statement.

15. On August 10, 2005, preceding the IPO, the balance in the RCM Accounts was \$395,230,539. During the period from August 10, 2005 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$83,184,273. *See* Capra Decl. ¶¶ 2, 6, and Exhibit 1 (Krys Expert Report) Appendix 6 and Exhibit 2.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 15 of the Moving Defendants' Rule 56.1 Statement. However, the decrease in balances at RCM is irrelevant for the reasons stated in Plaintiffs' Memorandum in Opposition to the Moving Defendants' Motion.

E. Grant Thornton Defendants

16. Grant Thornton LLP served as outside auditor to RGL, issuing audit opinions on RGL's consolidated financial statements. The first time any Grant Thornton audit opinion relating to Refco appeared in any public filing was in RGL's initial form S-4 registration statement, filed with the SEC on October 12, 2004. *See* Capra Decl. ¶ 9 & Exhibit 4.

Plaintiffs' Response

Plaintiffs dispute the facts stated in Paragraph 15 of the Moving Defendants' Rule 56.1 Statement. Refco LLC was required to, and did, publicly file Grant Thornton LLP's independent accountant's opinions with the Commodity Futures Trading Commission ("CFTC") and the

National Futures Association (“NFA”) for the fiscal years 2003 and 2004. *See* 17 C.F.R. §§ 1.10(g)(5), 1.16 (Apr. 1, 2003); Simpson Decl. Exs. N, O.

17. On October 12, 2004, the balance in the RCM Accounts was \$586,087,197. During the period from October 12, 2004 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$274,040,931. *See* Capra Decl. ¶¶ 2, 6, and Exhibit 1 (Krys Expert Report) Appendix 6, and Exhibit 2.

Plaintiffs’ Response

For purposes of the Moving Defendants’ Motion, Plaintiffs do not dispute the facts stated in Paragraph 17 of the Moving Defendants’ Rule 56.1 Statement. However, the decrease in balances at RCM is irrelevant for the reasons stated in Plaintiffs’ Memorandum in Opposition to the Moving Defendants’ Motion.

18. On August 5, 2004, the date the LBO Transaction closed, the balance in the RCM Accounts was \$541,577,862. During the period from August 5, 2004 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$229,531,596. *See id.*

Plaintiffs’ Response

For purposes of the Moving Defendants’ Motion, Plaintiffs do not dispute the facts stated in Paragraph 18 of the Moving Defendants’ Rule 56.1 Statement. However, the decrease in balances at RCM is irrelevant for the reasons stated in Plaintiffs’ Memorandum in Opposition to the Moving Defendants’ Motion.

F. Mayer Brown Defendants

19. Mayer Brown LLP and Messrs. Collins, Koury and Best provided certain legal services, at RGL's direction, to RGL in connection with the LBO. *See* Capra Decl. ¶ 11 and Exhibit 6 (Amended Complaint excerpt) at ¶¶ 257–58.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 19 of the Moving Defendants' Rule 56.1 Statement.

20. On August 5, 2004, the date the LBO Transaction closed, the balance in the RCM Accounts was \$541,577,862. During the period from August 5, 2004 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$229,531,596. *See* Capra Decl. ¶¶ 2, 6, and Exhibit 1 (Krys Expert Report) Appendix 6, and Exhibit 2.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 20 of the Moving Defendants' Rule 56.1 Statement. However, the decrease in balances at RCM is irrelevant for the reasons stated in Plaintiffs' Memorandum in Opposition to the Moving Defendants' Motion.

21. On October 12, 2004, the date of the initial S-4 filing by RGL and Refco Finance, the balance in the RCM Accounts was \$586,087,197. During the period from October 12, 2004 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$274,040,931. *See id.*

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 21 of the Moving Defendants' Rule 56.1 Statement. However, the decrease in balances at RCM is irrelevant for the reasons stated in Plaintiffs' Memorandum in Opposition to the Moving Defendants' Motion.

22. Mayer Brown LLP and Messrs. Collins and Best provided certain legal services, at Refco's direction, to Refco in connection with the IPO. *See* Capra Decl. ¶ 11 and Exhibit 6 (Amended Complaint excerpt) at ¶ 279.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 22 of the Moving Defendants' Rule 56.1 Statement.

23. On August 10, 2005, the day the Refco IPO commenced, the balance in the RCM Accounts was \$395,230,539. During the period from August 10, 2005 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$83,184,273. *See* Capra Decl. ¶¶ 2, 6, and Exhibit 1 (Krys Expert Report) Appendix 6 and Exhibit 2.

Plaintiffs' Response

For purposes of the Moving Defendants' Motion, Plaintiffs do not dispute the facts stated in Paragraph 23 of the Moving Defendants' Rule 56.1 Statement. However, the decrease in balances at RCM is irrelevant for the reasons stated in Plaintiffs' Memorandum in Opposition to the Moving Defendants' Motion.

Dated: New York, New York
August 31, 2012

KING & SPALDING LLP

By: /s/ James J. Capra, Jr.
James J. Capra, Jr.
James P. Cusick
1185 Avenue of the Americas
New York, New York 10036
Tel: (212) 556-2100

*Attorneys for Defendant
PricewaterhouseCoopers LLP*

**WILMER CUTLER PICKERING
HALE AND DORR LLP**

By: /s/ Philip D. Anker
Philip D. Anker
Peter J. Macdonald
Jeremy S. Winer
Ross E. Firsenbaum
7 World Trade Center
250 Greenwich Street
New York, New York 10007
Tel: (212) 230-8800

*Attorneys for Defendants Credit Suisse
Securities (USA) LLC and Merrill Lynch,
Pierce, Fenner & Smith, Incorporated, as
successor-by-merger to Banc of America
Securities LLC*

LINKLATERS LLP

By: /s/ James R. Warnot, Jr.
James R. Warnot, Jr.
Ruth E. Harlow
Robert H. Bell
1345 Avenue of the Americas

New York, New York 10105
Tel: (212) 903-9000

*Attorneys for Defendant Deutsche Bank
Securities Inc.*

WILLIAMS & CONNOLLY LLP

By: /s/ Craig D. Singer
John K. Villa
George A. Borden
Craig D. Singer
725 Twelfth Street, NW
Washington, DC 20005
Tel: (202) 434-5000

*Attorneys for Defendants Mayer Brown LLP
and Edward S. Best*

COOLEY LLP

By: /s/ William J. Schwartz
William J. Schwartz
Jonathan P. Bach
Reed A. Smith
1114 Avenue of the Americas
New York, NY 10036-7798
Tel: (212) 479-6000

Attorneys for Defendant Joseph P. Collins

CLAYMAN & ROSENBERG

By: /s/ Charles E. Clayman
Charles E. Clayman
305 Madison Avenue, Suite 1301
New York, NY 10165
Tel: (212) 922-1080

Attorneys for Defendant Paul Koury

WINSTON & STRAWN LLP

By: /s/ Linda T. Coberly
Linda T. Coberly
Bruce R. Braun
Catherine W. Joyce
David J. Doyle
35 W. Wacker Drive
Chicago, Illinois 60601
Tel: (312) 558-5600
Fax: (312) 558-5700

Luke A. Connelly
200 Park Avenue
New York, New York 10166
Ph: (212) 294-6700
Fax: (212) 294-4700

*Attorneys for Defendants
Grant Thornton LLP and Mark Ramler*